No. 82-2056

In the Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, ET AL.,
PETITIONERS

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA, AND
PALA BANDS OF MISSION INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

STEPHEN R. MELTON
Deputy General Counsel
JEROME M. FEIT
Solicitor
JOSEPH S. DAVIES, JR.
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

Of Counsel:
KRISTINA NYGAARD
Assistant General Counsel
Federal Energy Regulatory Commission
Washington, D.C. 20426

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2056

ESCONDIDO MUTUAL WATER COMPANY, ET AL., PETITIONERS

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA, AND PALA BANDS OF MISSION INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

In our initial brief we argued that the court of appeals misconstrued Section 4(e) of the Federal Power Act (Power Act), 16 U.S.C. 797(e), and Section 8 of the Mission Indian Relief Act of 1891 (MIRA), ch. 65, 26 Stat. 714, when it held that those provisions require the Federal Energy Regulatory Commission to accept, without modification, any and all conditions the Secretary of Interior may submit for inclusion in a Commission hydroelectric license and to obtain the consent of the Mission Indian Bands to issue the license. We urged further that the court of appeals compounded these er-

rors by extending the Section 4(e) requirements to reservations not physically occupied by the project. None of the contentions in the briefs of respondents or the amici who support them, the National Wildlife Federation *et al.* (Wildlife Amici), weakens the validity of our submissions.

I. THE SECRETARY'S CONDITIONING AUTHORITY

A. The Secretary responds to our contention that his Section 4(e) conditioning authority is subject to a reasonableness standard applied by the Commission,[1] by disregarding the close relationship between the Commission's broad duty under Section 4(e) to make the "interference/inconsistency" finding and the Secretary's more narrowly focused conditioning authority. It is apparently the Secretary's view that the obligations imposed by the two clauses of the Section 4(e) proviso are so separate and independent that the exercise of authority under one has "no bearing" upon the exercise of authority under the other and that therefore the Secretary may exercise his conditioning authority completely unfettered by the Commission. See Interior Br. 22, 31-32 n.35.[2]

This is flawed analysis. As we explained in our initial brief (at 17-26) the close relationship between the two grants of authority in the Section 4(e) proviso is mani-

---

[1] In the view of the Commission, the Secretary's conditions must be reasonably related to protection of a reservation from undue disruption by the physical aspects of the construction and operation of the project (FERC Br. 33).

[2] The Secretary's view is not shared by the Wildlife Amici. Thus, the Wildlife Amici recognize that the Secretary may use his conditioning authority "not to halt a project but to specify mitigation measures" (Wildlife Br. 9).

fested by the language of the proviso and supported by traditional canons of statutory construction. Clearly the exercise of one grant of authority has a direct impact on the exercise of the other; and, when in conflict, it is wholly reasonable that the broader authority of the Commission should prevail.

B.1. The Secretary contends that the legislative history of the Power Act supports the claim that Section 4(e) grants a Cabinet Secretary a "veto" over the issuance of a license by the Commission and "leaves no room" for the Commission to reject or modify the conditions he proposes (Interior Br. 22, 30). For example, the Secretary seizes upon a statement made in 1930 by the Chief of Engineers of the War Department characterizing the authority of the Secretary of War under Section 4(e) as a "veto power" (Interior Br. 30) and a statement (allegedly made by James Lawson, the Commission's Chief Legal Counsel) in an internal Commission memorandum to the Commission Executive Officer stating that under Section 4(e) " '[t]he function of the Secretary of Interior * * * is * * * to prescribe conditions to be inserted in the license for the protection and utilization of the reservation' " (Interior Br. 33).

The statement of the Chief of Engineers of the War Department, however, obviously refers to the part of Section 4(e) dealing with projects on navigable waters, not "reservations" (72 Cong. Rec. 10337 (1930)). That part of Section 4(e) does not refer to "conditions"; rather it specifically requires the "approval" of the Secretary of War and Chief of Engineers of the "plans" for dams and structures affecting navigation.[3] Nor do we

[3] This difference between the reservation and navigable rivers clauses of Section 4(e) shows that Congress could have re-

deny that, as stated in the internal Commission memorandum on which respondents rely, the Secretary has authority "to prescribe conditions for inclusion" in a Commission license; instead our position is that the Secretary lacks authority *to force* the Commission to include in its license, without modification, any and all conditions he proposes even if they are patently unreasonable. Indeed, as noted in our initial brief (at 26, citation omitted), James Lawson, the alleged author of that memorandum, explained to Congress one year later that " '[t]he Commission now has power to overrule the head of the department as to the consistency of a license with the purpose of any reservation.' "[4]

---

quired direct "approval" by a Cabinet Secretary of a project on a reservation as a prerequisite to issuing a license, rather than merely conferring conditioning authority. In any event, the District of Columbia Circuit has held that where the Power Act requires the "approval" by the Secretary of Interior for "annual charges" set by the Commission under Section 10(e), 16 U.S.C. 803(e), the Secretary cannot withhold his "approval" unless the charges are "unreasonable." *Montana Power Co.* v. *FPC*, 459 F.2d 863, 873-874 (D.C. Cir.), cert. denied, 408 U.S. 930 (1972). See FERC Br. 42-43. Thus, even where the Power Act specifies that "approval" must be obtained from another source, that authority is not the equivalent to "veto" authority. Surely a lesser conditioning power, as here, may not be elevated into an unyielding directive.

[4] The Secretary (Interior Br. 31-32 n.35) contends this 1930 remark relates only to the inconsistency/interference clause in the Section 4(e) proviso, not the conditioning clause of the proviso. But Lawson's statement can hardly be read in such a grudging manner. Since a Cabinet Secretary does not make the interference/inconsistency finding, Lawson could only be referring to the fact that the Commission's authority to make the inconsistency/interference finding modifies the authority of a Cabinet Secretary to impose conditions under Section 4(e).

Likewise, a statement by Senator Walsh (made in response to an attempt to subject the bill to an amendment requiring Indian consent for the issuance of a license) that " 'the Secretary of Interior in the case of an Indian reservation must agree that the license shall be issued' " (Interior Br. 27, quoting 59 Cong. Rec. 1564 (1920)), does not support Interior's far broader claim that Section 4(e) authorizes the Secretary to "veto" a license. The basic focus of the Senator's statement was to prevent the inclusion of Indian veto authority within the Act. See also 59 Cong. Rec. 1565 (1920) (statement of Sen. Myers).

Moreover, the Secretary's interpretation of Senator Walsh's statement cannot be reconciled with the Senator's earlier statement that " 'under the authority given this commission in this bill the Secretary of Agriculture, as the executive head of that department, can not block a project upon which the other two Commissioners have agreed' " and that " '[t]he Department of War and the Department of the Interior can adopt a project even if the Secretary of Agriculture opposes it.' " See FERC Br. 24-25 n.29 (quoting 56 Cong. Rec. 9668-9669 (1918) (remarks of Sen. Walsh)). Indeed, since Senator Raker, the sponsor of the Wilson Administration's bill that became the Federal Water Power Act, specifically endorsed this earlier statement of Senator Walsh (*ibid.*), it is clear that the bill was not designed to confer authority on any of the three Cabinet officers "to block" the issuance of a license.[5] Moreover, as noted in

[5] Undeniably, there are occasions where Congress has subjected administrative action to "the consent" of another agency or executive department. Thus the Wildlife Amici cite a 1947 provision in the Mineral Leasing Act for Acquired Lands, 30

our initial brief (at 26), statements by a variety of participants at the 1930 hearings at which the Power Act was amended, including a statement of the Secretary of Interior, confirm that the conditioning authority of the Cabinet Secretaries under Section 4(e) is not equivalent to "veto" authority.

2. To be sure, the Commission has long recognized that conditions proposed by a Secretary under Section 4(e) are entitled to great weight by the Commission (see FERC Br. 33-34). We do not retreat from that position here. We say only that the Secretary may not require the Commission to adopt "without modification" conditions he proposes when, in the Commission's expert view, the proposed conditions are not reasonably related to protection of a reservation from undue disruption by the physical aspects of the construction and operation of the project. See FERC Br. 33-34; see also *Chapman* v. *El Paso Natural Gas Co.*, 204 F.2d 46 (D.C. Cir. 1953).[6]

U.S.C. (& Supp. V) 352, to support their position here. In point of fact, however, that provision, like the navigable waters proviso relied upon by amici, authorizes a head of a department to subject a mineral lease on lands under his jurisdiction to conditions but *additionally* requires his "consent" for the project. That provision therefore supports our view that where an Act merely allows the head of a department to condition a license, his authority is not tantamount to "veto" authority.

[6] The Secretary (see Interior Br. 33-34) misinterprets Commission precedent in arguing that the Commission's interpretation of Section 4(e) is not deeply rooted on the ground that the Commission's statement in *Pigeon River Lumber Co.*, 1 F.P.C. 206 (1935) refers to the inconsistency/interference finding, not the Secretary's conditioning authority. To the contrary, in our view *Pigeon River* wholly supports the Commission claim that its finding authority controls the Secretary's conditioning authority. See 1 F.P.C. at 209. Nor is Interior's claim that the

3. It deserves noting with regard to the legislative history that neither the Secretary nor the Bands responds to that aspect of the history detailed in our initial brief (at 28-30, 33-34) which clearly shows that the 1920 Act carried forward the approach adopted in the earlier right-of-way statutes regarding use of federal lands for hydroelectric facilities. The retention of these traditional concepts strongly supports our submission that Congress in granting a Cabinet Secretary conditioning authority in the licensing context also meant to preserve the already well-established principle that the authority to impose conditions on a right-of-way only permits the imposition of those reasonable terms and conditions needed to minimize physical interference with the use of the servient lands. See FERC Br. 29-30 n.34, 34-36 & n.40.

C. Section 30 of the Power Act, 16 U.S.C. 823a, which authorizes the Commission to "exempt" certain small projects from the licensing and other requirements of the Federal Power Act, provides that "the Commission shall * * * include in any such exemption—* * * such terms and conditions as the United States Fish and Wildlife Service and the State [fish and wildlife] agency each determine are appropriate" to preserve fish and wildlife resources (§ 30(c) and (1), 16 U.S.C. 823a(c) and (1).[7] The Wildlife Amici contend

---

Secretary's conditions were not rejected prior to 1975 (Interior Br. 34) persuasive; that simply shows that until 1975 Interior did not make any claim to the extravagant conditioning authority it has asserted here.

[7] In addition, Section 408(b) and (c) of the Energy Security Act, Pub. L. No. 96-294, 94 Stat. 718, amended Sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. 2705 and 2708, to allow the Commission

(Wildlife Br. 11-14) that the Commission's interpretation of Section 4(e) in this case is wholly at odds with its construction of Section 30(c), since the Commission has held that under Section 30(c) it "is not within * * * [its] authority to review by evidentiary hearings or otherwise conditions properly imposed by fish and wildlife agencies" for inclusion in an exemption. *Swanson Mining Corp.*, 22 F.E.R.C. (CCH) ¶ 61,184, at 61,319 (1983); accord, *Swanson Mining Corp.*, 20 F.E.R.C. (CCH) ¶ 61,229 (1982); *Southern Pacific Land Co.*, 19 F.E.R.C. (CCH) ¶ 61,297 (1982); *Sierra Pacific Power Co.*, 19 F.E.R.C. (CCH) ¶ 61,307 (1982).[8] However, a comparison of Section 4(e) with Section 30(c) makes clear that the Commission acts properly in adopting a different approach to each of these two statutory provisions.

As the Wildlife Amici concede, the first clause of the Section 4(e) proviso vests the Commission with the authority to make "a go/no-go decision on the project" (Wildlife Br. 9) and the Secretary's authority is limited

---

also to exempt small hydroelectric projects under five megawatts built in connection with existing dams from licensing requirements under Section 30(c) and (d) of the Power Act. See Sections 405(d) and 408(b) of PURPA, 16 U.S.C. 2705(d) and 2708(b).

[8] As the Wildlife Amici recognize (Wildlife Br. 13 n.22), in the *Swanson* case, the Commission nevertheless refused to impose a condition proposed by a state fish and wildlife agency that was not related to the project's environmental impact. In *Sierra Pacific Power Co.*, 19 F.E.R.C. (CCH) ¶ 61,307, at 61,600-61,601 (1982), the Commission also refused to include a condition in an exemption proposed by the Fish and Wildlife Service that would have required the applicant to change its position in court litigation. In the view of the Commission, such a condition was "inappropriate."

under the second clause of the Section 4(e) proviso to conditioning the license with "mitigation measures" (Wildlife Br. 9, 11). In marked contrast, Section 30 does not allocate any broad responsibility to the Commission to enter a finding that an exemption is compatible with the protection of fish and wildlife or with the terms of the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq*. In fact, the legislative history of Section 30 specifically states that an exception "may not be granted" by the Commission if either the federal or state fish and wildlife agency "finds" that the project is not in accordance with the Fish and Wildlife Coordination Act and, *in addition*, that the Commission shall require in any exemption it issues the conditions proposed by the appropriate fish and wildlife agencies. See H.R. Rep. 95-543, 95th Cong., 2d. Sess. 50 (1977). In short, under Section 30 both the finding and conditioning authority, as it relates to fish and wildlife, are entrusted to the state and federal fish and wildlife agencies.

Section 30 was thus specifically designed by Congress to expedite authorization for certain small hydroelectric projects by taking them outside the normal procedures required under the Power Act. Unlike its Section 4(e) authority, the Commission's processing of an exemption application under Section 30 does not entail identifying and balancing all aspects of the public interest in the context of a comprehensive development standard. Rather, for the category of projects which qualify for exemption, Congress has already made the key public interest judgments and allocated both the finding and conditioning responsibilities for protection of fish and wildlife to the state and federal fish and wildlife agencies.

D. Both Interior (Br. 14, 37-38) and Wildlife Amici (Br. 18-19) agree that the Secretary's conditions must be reasonable; they contend, however, that it is the court of appeals, not the Commission, which is empowered to make that reasonableness determination in the first instance. As Judge Anderson well stated in dissent (Pet. App. 41):

> I agree conditions imposed by the Secretary are mandatory on FERC to the extent they are reasonable; the crucial issue is which forum—the Secretary of Interior, FERC, or the reviewing court—is to decide reasonableness.
>
> I would place the initial reasonableness decision on FERC, for it is, after all, the forum in which the initial fact-finding function is vested.

Judge Anderson's approach is sustained by governing precedent. As this Court held in its landmark jurisdictional decision in *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), Section 313 of the Federal Power Act, 16 U.S.C. 825*l*, provides the exclusive means for judicial review of Commission orders. It allows only "aggrieved parties" in the administrative proceedings before the Commission to challenge Commission orders on appeal and requires such parties to raise any error in a Commission order to the Commission on rehearing to preserve the issue on appeal. 357 U.S. at 336. Section 313 simply does not provide room for testing the validity of Section 4(e) conditions proposed by a Cabinet Secretary in the first instance on appeal, without the benefit of a record developed before the Commission and a Commission decision expressing its view on the legitimacy of the proposed conditions.

Nor can the Secretary fairly brush aside traditional statutory review procedures, as "insubstantial" (Interior Br. 38), for that argument ignores the express review provisions of the Act and is ultimately impracticable. It thus is not hard to see where that proposed scheme would lead. Viewed in terms of this case, it would, for example, compel the Commission to include, without question, the condition proposed by Interior (an interested party in the litigation before the Commission[9]) that the Bands be granted the "reserved and other rights" to the waters of the San Luis Rey River.[10] Moreover, the Commission would be required to defend the decision to adopt that condition and then to enforce that condition under Sections 26 and 314 of the Power Act, 16 U.S.C. 820 and 825m, irrespective that

---

[9] As the administrative law judge pointed out, Interior itself recognized in the joint brief it filed with the Bands in the administrative proceedings that the "net effect" of its proposed conditions would be to "resemble the operations under the [Bands' proposed] nonpower license or [Interior's] recapture alternative, for that is the only way to assure the adequate protection and utilization of the reservation." 6 F.E.R.C. (CCH) ¶ 63,008, at 65,075 (1979).

[10] The Secretary to the contrary notwithstanding (Interior Br. 37), the Commission explained in its orders why Interior's conditions were unjustified. For example, it stated in regard to Interior's water-rights condition (Pet. App. 148 (footnote omitted)):

> Condition 4 is rejected in its entirety because it represents an asserted acknowledgement and quantification of the Bands' claimed water rights under the Winters doctrine and, as indicated, the Bands and Interior expressly "acknowledge that the Commission is without jurisdiction to adjudicate the merits of the existing water rights controversy between the Bands and Mutual and Vista." Condition 4 would therefore require the Commission to do indirectly what they acknowledge cannot be done directly.

the Commission undeniably lacks jurisdiction to resolve water-rights claims and that such claims are now pending in the United States District Court for the Southern District of California and the Court of Claims.[11] Surely, Congress could not have intended such a bizarre statutory review procedure.

II. THE REACH OF THE SECTION 4(e) PROVISO

The court below held that the water rights of downstream reservations, even though not occupied or traversed by this project, are nonetheless subject to the Section 4(e) provision on the ground that water rights are reservations (Pet. App. 25-26). This conclusion rests on flawed logic, finds no support in the statute, and is wholly inconsistent with this Court's decision in *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960) construing the word "reservation" as it is used in the Power Act.

As we pointed out in our initial brief (at 37, quoting 16 U.S.C. 796(2) (emphasis added)) the Power Act specifically defines a reservation "as '*tribal lands* embraced within Indian reservations' " and more generally as "lands and interests in lands owned by the United States." There is not the slightest suggestion in the

---

[11] Section 313(b) only allows an "aggrieved party" to challenge Commission orders; the role of the Commission in all appeals is to defend its orders. It is difficult to envision how the Commission could nonetheless object to the license on appeal as respondents assert. Moreover, the Secretary presumes too much in stating that the "disappointed applicant" would raise the conditioning issues on review before the court of appeals (see Interior Br. 38-39 n.40). Surely, it is the Commission, not the applicant, that represents the public interest; nor will it always be clear that the interest of the applicant and the public will always coincide.

text or history of the Power Act that Congress intended water rights also to be treated as reservations.[12]

This Court's decision in *Tuscarora*, moreover, fully supports our position. As this Court there emphasized, the "plain words" of the definition of "reservations" in Section 3(2) of the Act, "clearly * * * show that Congress intended the term 'reservations,' wherever used in the Act, to embrace only 'lands and interests in lands owned by the United States'" (362 U.S. at 111-114). Indeed, if the jurisdictional term "reservations" was meant to include reservations that may be affected by a project but which are not physically occupied by it, as respondents urge, it must follow that the Commission has jurisdiction to issue licenses for projects "within a reservation" under the public lands and reservations clause of Section 4(e) even though the projects do not physically occupy any reservation. But that result would be contrary to *Tuscarora*'s teaching that the Commission's licensing jurisdiction only extends to projects "on" public lands and reservations. *Id.* at 113.[13]

---

[12] It is not at all clear, as the Secretary casually asserts, that Judge Anderson agreed with this aspect of the majority opinion. See Pet. App. 33.

[13] There is no support for respondents' allegation that since the project "affects" the water rights of downstream reservations those water rights are reservations. See Interior Br. 40. The short answer is, of course, that Congress did not use the word "affect" in the present context and there is no reason to find its use by implication.

Furthermore, the approach of the court of appeals is inconsistent with other parts of the statutory scheme of the Power Act. As this Court observed in *Tuscarora Indian Nation*, 362 U.S. at 114 (emphasis in original), in regard to Section 10(e) of the Power Act, dealing with compensation for use of Indian reservation land, "[i]t therefore appears to be unmistakably clear that * * * 'when licenses are issued involving the use of * * * *tribal lands embraced within Indian reservations* * * *' Congress intended to treat and treated only with structures, lands and interests in lands owned by the United States, for, as stated, the section expressly requires the 'reasonable annual charges' to be paid to the *United States* for the use, occupancy, and enjoyment of '*its lands or other property*.' "

As we have urged in our initial brief (at 28-30, 33-36) such a construction—focusing on interests in land—logically follows from the legislative history of the Federal Water Power Act, which shows Congress was concerned with authorizing the Commission to grant rights-of-way over reservation land for the construction and operation of hydroelectric projects and that it modeled the Act on earlier right-of-way statutes under which hydroelectric projects on federal lands had been authorized.[14]

---

[14] Respondents do not even respond to the Commission's argument that Section 8 of MIRA was designed *to authorize* the Mission Indian Bands, subject to the approval of the Secretary of Interior, to alienate their reservation lands by contracting with *private parties*, for rights-of-way across their reservation lands and that nothing in Section 8 of MIRA or its legislature history even remotely suggests that Section 8 was designed to

III. THE ISSUE WHETHER SECTION 4(e) IS APPLICABLE TO RELICENSING IS NOT PROPERLY PRESENTED IN THIS CASE

Petitioners allege that Section 4(e) of the Power Act has no application to this case because this is a relicensing proceeding under Section 15 of the Power Act (16 U.S.C. 808) and Section 4(e) only applies to an application for original licenses (Pet. Br. 42-44). On the other hand, the Bands argue (Bands Br. 19 n.10) that Section 4(e) is applicable to relicensing under Section 15(a) of the Power Act because Section 15(a) authorizes the issuance of a new license, when an original license has expired, "upon such terms and conditions as may be authorized or required under the then existing laws and regulations." We agree with the Secretary (Interior Br. 21 n.24) that the issue is not properly presented and should not be decided in this case.

---

limit the long-standing sovereign authority of Congress to acquire or grant rights-of-way under its plenary power over public lands and reservations. See *Tuscarora Indian Nation*, 362 U.S. at 115-124; *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957); *United States* v. *Wittek*, 337 U.S. 346, 358-360 (1949); *Grand River Dam Authority* v. *FPC*, 246 F.2d 453, 455 (10th Cir. 1957).

While the United States District Court for the Southern District of California, where the water litigation is pending, has upheld the respondents' claims as to MIRA, that decision is still interlocutory. *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, Nos. 69-217-S, 72-276-S and 72-271-S (S.D. Cal. Jan. 10, 1980). In any event the district court indicated that it was not purporting to decide any issues regarding the Commission's jurisdiction to grant rights-of-way for power projects on Mission Indian Reservations. *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, Nos. 69-217-S, 72-276-S and 72-271-S (S.D. Cal. Dec. 10, 1980), slip op. 2-3 & n.1.

There is Commission precedent indicating that Section 4(e) has no application to relicensing proceedings;[15] however, the Commission did not confront that issue in this case. In its view, this case involves only an original license since Lake Henshaw and its facilities, which are included in this new license, had not been included in the 1924 license (Pet. App. 133-137 & n.136). There is surely no reason to reach or to resolve the issue wheth-

---

[15] *E.g.*, *Pacific Gas & Electric Co.*, 53 F.P.C. 523, 526 (1975) (holding that it was not necessary to adopt conditions proposed by the Secretary of Interior because the relicensing takes place "under Section 15 rather than Section 4(e)"); see also *Montana Power Co.*, 56 F.P.C. 2008, 2013 (1976) (distinguishing between an original license issued under Section 4(e) and a relicensing under Section 15(a)).

The Commission also refused to apply an Indian treaty to an application for annual licenses and a relicensing without specifically deciding whether Section 15 incorporated Section 4(e). *Northern States Power Co.*, 50 F.P.C. 753 (1973), aff'd *sub nom. Lac Courte Oreilles Band of Indians* v. *FPC*, 510 F.2d 198 (D.C. Cir. 1975). A statement in the District of Columbia Circuit's opinion by Judge Skelly Wright, from which Judge McKinnon dissented (510 F.2d at 212), seems to assume Section 4(e) would apply to a relicensing. That issue, however, was never briefed before the District of Columbia Circuit by the Commission in that case, which basically involves authority to issue annual licenses. Thus, the courts have never decided whether Section 4(e) applies to a relicensing. But see, *Northern States Power Co.*, 13 F.E.R.C. (CCH) ¶ 61,055, at 61,114 (1980), applying Section 4(e) to the relicensing without explanation on the remand from the District of Columbia Circuit.

It is true that in two recent cases the Commission did assume Section 4(e) applies to relicensing proceedings. *Pacific Gas & Electric Co.*, 25 F.E.R.C. (CCH) ¶ 61,010 (1983) (Opinion 187), and 25 F.E.R.C. (CCH) ¶ 61,344 (1983) (Opinion 187-A) and *Southern California Edison Co.*, 23 F.E.R.C. (CCH) ¶ 61,240 (1983). However, the Commission has recently requested the Ninth Circuit to remand those cases for further examination.

er Section 4(e) applies to "relicensings" where its applicability was not passed upon by the Commission.[16]

CONCLUSION

For the foregoing reasons, and those started in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

Respectfully submitted.

STEPHEN R. MELTON
Deputy General Counsel
JEROME M. FEIT
Solicitor
JOSEPH S. DAVIES, JR.
Attorney
Federal Energy Regulatory Commission

Of Counsel:
KRISTINA NYGAARD
Assistant General Counsel
Federal Energy Regulatory Commission

MARCH 1984

I authorize the filing of this brief.

REX E. LEE
Solicitor General

---

[16] There is, moreover, a serious issue whether the claim of petitioners, was preserved by petitioners on rehearing in accord with the requirements of Section 313(a) of the Power Act, 16 U.S.C. 825*l*(a). See Interior Br. 21 n.24; see also the petitions for rehearing of the Commission's initial opinion (Opinion 36) and the Commission opinion on rehearing (Opinion 36-A) filed by petitioners (COR 25,834-25,926, 26,394-26,414).